A

Mohd Radwan Alami v Ibrahim bin Mohd Yusof & Ors

B

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-616–11 OF 2018
AHMAD FAIRUZ JC
6 MAY 2019

C

Companies and Corporations — Directors — Appointment — Whether appointment of director must complied with company's articles of association or the Companies Act 2016 — Whether resolution passed must complied with constitution of company — Whether meeting of one shareholder valid — Companies Act 2016 ss 32 & 302(2)(a)

D

The plaintiff by an originating summons applied to the court to declare the appointment of the first defendant as a director of the third defendant null and void. The basis of the application stemmed from the plaintiff's contention that the manner in which the appointment was made via a circular resolution, contravened s 302(2)(a) of the Companies Act 2016 ('the Act') as the

E

company's constitution or articles of association ('AOA') as in article 67 required a general meeting to be convened for such appointments. The defendants argued otherwise, stating that there was justification to employ the manner in which the resolution was passed and there was no contravention of the Act. The plaintiff, a Syrian national with a permanent residency in Malaysia

F

was a director and a 40% minority shareholder in the third defendant. The second defendant was a director and 60% majority shareholder of the third defendant. Both were the founding directors of the third defendant. The third defendant was a private company limited by shares that was incorporated in Malaysia in 1999. Its business was related to the process, manufacture and

G

export of upstream and downstream palm oil and other edible oil products. The first defendant was appointed as director in the third defendant on 4 September 2018. The fourth defendant was the company secretary who was appointed by the third defendant's board after the appointment of the first defendant on 6 September 2018. Sometime in 2015, relationship between the

H

plaintiff and the second defendant turned sour and led to a situation where there was deadlock at the board of director's level. Both the plaintiff and second defendant no longer could cooperate together. The company's financier filed a lawsuit against the third defendant which resulted in the relationship between the two founding members of the company to deteriorate even further. The

I

deadlock resulted in the company not being able to function in its ordinary course of business. It led to the passing of the resolution dated 4 September 2018 ('the written resolution') which appointed the first defendant. The plaintiff refused to recognise the appointment of the first defendant. It led to the filing of the present application before the court. The plaintiff contended

that the second defendant's action on 10 August 2018 to issue a notice of requisition to propose by ordinary resolution to appoint the first defendant as an additional director of the third defendant had breached the Act. It was because the proposed resolution was eventually passed as a written resolution on 4 September 2018 when the second defendant signified his agreement to the proposed resolution by way of email. The plaintiffs argued that as article 67 of the AOA provided that all ordinary resolutions were to be passed at a general meeting, the action of the second defendant passing the written resolution was contrary to the provision of s 302(2) of the Act. It was argued by the plaintiff that s 302(2)(a) of the Act was a carve out intended by Parliament to allow the provision of the AOA to take primacy over the Act and the Latin maxim of generalia specialibus non derogant was therefore applicable. The defendants on the other hand argued that s 290(1) of the Act provided that a resolution of members of a private company shall be passed either by a written resolution or a meeting of members. As the third defendant was a private company, the said provision allowed for an option to be chosen when passing a resolution. It was argued that article 67 of the AOA could not override s 290(1) of the Act as the strict prohibition in s 32(2) of the Act stated that a provision of any AOA which contravened the Act had no effect.

Held, allowing the plaintiff's application with costs of RM10,000:

(1) It was obvious from a reading of article 67 of the AOA, the appointment of directors must be done at a general meeting. Even if the emphasis was on the word 'may', it did not provide any other alternatives. As such the words might refer specifically to the company convening a general meeting. The court was compelled to agree with counsel for the plaintiff that it represented a carve out of the general prohibition in s 32(2) of the Act. It was an exception specifically provided for by the Act and would fall under the application of the maxim *generalia specialibus non derogant*. The usage of that canon of construction was not alien in its application. Section 302(2)(a) of the Act provided primacy to the constitution of company when it stated that any resolution, moved as a written resolution, would be ineffective if it was inconsistent with any written law or the constitution of the company. Where there was a specific provision that allowed for an exception under the Act, such exception must be taken as a literal approval to derogate from the general provision. There was no incongruity between the company constitution and the Act if such interpretation was made. The prohibition under s 32(2) of the Act merely operated as notice that when a company adopted a constitution or AOA, any provision of the constitution that contravened the Act could not be sustained. However, s 302(2)(a) of the Act cured the inconsistency as it provided primacy of the constitution or AOA over the Act (see paras 23–26 & 28).

(2) Even before the object was met, the manner in which such resolution was moved must be in accordance with the constitution or AOA of the company. It could not mean that the law was not concerned with the manner in which the resolution was moved. Such an interpretation would suggest that it was open for parties to disregard the constitution of the company. It rendered the specific provision of the constitution or AOA otiose. It could not be so. The appointment of a company director was a significant action by the company. It must be in accordance with the constitution or AOA of the company. If the manner in which such appointments were to be made was prescribed, it had to be followed religiously as the AOA of the company was the basic law of a company. In fact, the AOA was a contractual obligation that members subscribed to and it contained covenants that each member would observe all the provisions of the AOA. The effect of a constitution when adopted, would bind the company and the members to the same extent as if the constitution had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the constitution. The court was of the firm view s 302(2)(a) of the Act could be interpreted literally upon a plain reading of the said provision. There was no ambiguity in such an interpretation (see paras 31–32 & 35–36).

(3) In such a situation, where there was a clear breakdown between the two shareholders of the company, the action by one party to unilaterally appoint an additional director could not be the solution to be adopted, no matter how altruistic the intentions were. The second defendant must resort to what was provided under the Act. The solution to the deadlock could be resolve by having recourse to s 314 of the Act. Section 314 of the Act clearly did not preclude a court from convening a meeting by the attendance of one single shareholder. The onus lay on the party seeking to move the court to order such a meeting by demonstrating that it was impracticable to do so under the normal provisions of the company's AOA. Given that the court was of the opinion that the written resolution was ineffective, the other alternative arguments raised by the parties were therefore no longer necessary to be considered. Parties too, had not pursued the other points assiduously as the crux of the issue was on the interpretation of s 302(2)(a) of the Act (see paras 43–44 & 48–49).

[Bahasa Malaysia summary

Plaintif melalui saman pemula memohon kepada mahkamah untuk mengisytiharkan pelantikan defendan pertama sebagai pengarah defendan ketiga batal dan tidak sah. Asas permohonan tersebut berpunca daripada pertikaian plaintif bahawa cara pelantikan dibuat melalui resolusi pekeliling, melanggar s 302(2)(a) Akta Syarikat 2016 ('Akta') sebagai perlembagaan syarikat atau artikel persatuan ('AOA') seperti dalam perkara 67 memerlukan mesyuarat agung untuk diadakan untuk pelantikan sedemikian. Defendan

berpendapat sebaliknya, menyatakan bahawa terdapat justifikasi untuk menggunakan cara di mana resolusi diluluskan dan tiada pelanggaran terhadap Akta tersebut. Plaintif, seorang warganegara Syria dengan pemastautin tetap di Malaysia adalah pengarah dan pemegang saham minoriti 40% dalam defendan ketiga. Defendan kedua adalah seorang pengarah dan pemegang saham majoriti 60% dalam defendan ketiga. Kedua-duanya adalah pengarah pengasas defendan ketiga. Defendan ketiga adalah syarikat swasta terhad menurut saham yang diperbadankan di Malaysia pada tahun 1999. Perniagaannya berkaitan dengan proses, pembuatan dan eksport minyak kelapa sawit dan produk minyak boleh dimakan yang lain. Defendan pertama dilantik sebagai pengarah dalam defendan ketiga pada 4 September 2018. Defendan keempat ialah setiausaha syarikat yang dilantik oleh lembaga defendan ketiga selepas pelantikan defendan pertama pada 6 September 2018. Pada 2015, hubungan antara plaintif dan defendan kedua berubah suram dan membawa kepada keadaan di mana terdapat kebuntuan di peringkat lembaga pengarah. Kedua-dua plaintif dan defendan kedua tidak lagi dapat bekerjasama. Pembiaya syarikat tersebut memfailkan tuntutan terhadap defendan ketiga yang mengakibatkan hubungan antara kedua-dua pengasas syarikat tersebut semakin merosot. Kebuntuan menyebabkan syarikat tidak dapat berfungsi dalam urusan perniagaan biasanya. Ia membawa kepada resolusi bertarikh 4 September 2018 ('resolusi bertulis') yang melantik defendan pertama. Plaintif enggan mengakui pelantikan defendan pertama. Ia membawa kepada pemfailan permohonan ini di hadapan mahkamah. Plaintif berpendapat bahawa tindakan defendan kedua pada 10 Ogos 2018 untuk mengeluarkan notis permintaan untuk mencadangkan melalui resolusi biasa untuk melantik defendan pertama sebagai pengarah tambahan defendan ketiga telah melanggar Akta. Ia adalah kerana resolusi yang dicadangkan tersebut akhirnya diluluskan sebagai resolusi bertulis pada 4 September 2018 apabila defendan kedua menunjukkan perjanjiannya dengan resolusi yang dicadangkan melalui e-mel. Plaintif berpendapat bahawa oleh kerana perkara 67 AOA menyatakan bahawa semua resolusi biasa akan diluluskan pada mesyuarat agung, tindakan defendan kedua yang meluluskan resolusi bertulis adalah bertentangan dengan peruntukan s 302(2) Akta. Ia telah dihujahkan oleh plaintif bahawa s 302(2)(a) Akta adalah ukiran yang dimaksudkan oleh Parlimen untuk membenarkan peruntukan AOA untuk mengambil keutamaan ke atas Akta dan maxim Latin generalia specialibus non derogant tidak boleh digunakan. Defendan bagaimanapun berpendapat bahawa s 290(1) Akta menyatakan bahawa resolusi anggota syarikat persendirian hendaklah diluluskan sama ada melalui resolusi bertulis atau mesyuarat ahli. Oleh kerana defendan ketiga adalah syarikat persendirian, peruntukan tersebut membenarkan pilihan untuk dipilih ketika meluluskan resolusi. Adalah dihujahkan bahawa perkara 67 AOA tidak dapat mengatasi s 290(1) Akta kerana larangan yang ketat dalam s 32(2) Akta menyatakan bahawa peruntukan mana-mana AOA yang melanggar Akta tidak berkuatkuasa.

A B C D E F G H I

Diputuskan, membenarkan permohonan plaintif dengan kos sebanyak RM10,000:

(1) Adalah jelas daripada pembacaan perkara 67 AOA, pelantikan pengarah mesti dilakukan pada suatu mesyuarat agung. Walaupun penekanan pada perkataan 'may', ia tidak menyediakan sebarang alternatif lain. Oleh itu, perkataan tersebut mungkin merujuk secara khusus kepada syarikat yang mengadakan mesyuarat agung. Mahkamah harus bersetuju dengan peguam bagi plaintif bahawa ia mewakili pengukiran larangan umum dalam s 32(2) Akta. Ia adalah satu pengecualian yang diperuntukkan oleh Akta dan akan digunapakai di bawah maxim maxim generalia specialibus non derogant. Penggunaan kanun pembinaan tersebut tidak asing dalam permohonannya. Seksyen 302(2)(a) Akta memperuntukkan keutamaan kepada perlembagaan syarikat apabila menyatakan bahawa apa-apa resolusi, dijadikan sebagai resolusi bertulis, akan menjadi tidak berkesan jika ia tidak konsisten dengan mana-mana undang-undang bertulis atau perlembagaan syarikat tersebut. Sekiranya terdapat peruntukan khusus yang membenarkan pengecualian di bawah Akta, pengecualian perlu diambil sebagai kelulusan literal untuk menghilangkan peruntukan am. Tidak terdapat sebarang kejanggalan antara perlembagaan syarikat dan Akta jika tafsiran tersebut dibuat. Larangan di bawah s 32(2) Akta hanya dikendalikan sebagai notis bahawa apabila suatu syarikat mengguna pakai suatu perlembagaan atau AOA, sebarang peruntukan perlembagaan yang melanggar Akta tidak boleh dikekalkan. Walau bagaimanapun, s 302(2)(a) Akta menyembuhkan ketidakselarasan kerana ia memberi keutamaan perlembagaan atau AOA ke atas Akta (lihat perenggan 23–26 & 28).

(2) Malah sebelum objek tersebut dipenuhi, cara resolusi diangkat mestilah mengikut perlembagaan atau AOA syarikat. Ini tidak bermakna bahawa undang-undang tidak berkenaan dengan cara resolusi tersebut diangkat. Tafsiran sedemikian akan mencadangkan bahawa ia terbuka kepada pihak-pihak untuk mengabaikan perlembagaan syarikat. Ia menjadikan peruntukan tertentu perlembagaan atau AOA sia-sia. Ia tidak boleh terjadi. Pelantikan seorang pengarah syarikat adalah tindakan penting oleh syarikat. Ia mestilah mengikut perlembagaan atau AOA syarikat. Sekiranya cara pelantikan sedemikian dibuat ditetapkan, ia mesti diikuti dengan betul kerana AOA syarikat adalah undang-undang asas sebuah syarikat. Malah, AOA adalah kewajipan berkontrak yang ditandatangani oleh ahli-ahli dan mengandungi perjanjian yang setiap anggota akan mematuhi semua peruntukan AOA. Kesan perlembagaan apabila diguna pakai, akan mengikat syarikat dan ahli setakat yang sama seolah-olah perlembagaan telah ditandatangani dan dimeterai oleh setiap ahli dan mengandungi perjanjian di pihak setiap ahli untuk mematuhi semua peruntukan perlembagaan. Mahkamah dengan tegas berpendapat s 302(2)(a) Akta boleh ditafsirkan secara literal atas bacaan biasa

peruntukan tersebut. Tiada kekaburan dalam tafsiran seperti ini (lihat perenggan 31–32 & 35–36).

(3) Dalam keadaan sedemikian, di mana terdapat pecahan jelas antara kedua pemegang saham syarikat tersebut, tindakan oleh satu pihak untuk secara satu pihak melantik seorang pengarah tambahan tidak boleh menjadi penyelesaian untuk diterimapakai, tidak kira bagaimana altruistik niatnya. Defendan kedua mesti menggunakan apa yang diperuntukkan di bawah Akta. Penyelesaian kepada kebuntuan tersebut boleh diselesaikan dengan bantuan s 314 Akta. Seksyen 314 Akta dengan jelas tidak menghalang mahkamah daripada mengadakan mesyuarat dengan kehadiran seorang pemegang saham tunggal. Tanggungjawab terletak pada pihak yang ingin memohon kepada mahkamah untuk memerintahkan mesyuarat tersebut dengan menunjukkan bahawa tidak praktikal untuk berbuat demikian di bawah peruntukan normal AOA syarikat. Memandangkan mahkamah berpendapat bahawa resolusi bertulis tersebut tidak berkesan, hujah-hujah alternatif lain yang dibangkitkan oleh pihak-pihak itu tidak lagi perlu dipertimbangkan. Pihak-pihak juga tidak mengejar perkara-perkara lain dengan tegas kerana perkara penting adalah mengenai tafsiran s 302(2)(a) Akta (lihat perenggan 43–44 & 48–49).]

Notes

For cases on appointment, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 200–206.

Cases referred to

Beh Chun Chuan v Paloh Medical Centre Sdn Bhd & Ors [1999] 3 MLJ 262, HC (refd)

Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 2) [1998] 1 MLJ 110, CA (refd)

Ling Beng Hui & Ors v Ling Beng Sung [1990] 2 MLJ 186, HC (refd)

Low Son Siang @ Loo Soon Siong v Lee Kim Yong [1998] MLJU 467, HC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (refd)

Public Prosecutor v Chew Siew Luan [1982] 2 MLJ 119, FC (refd)

Qatar Islamic Bank v Asian Finance Bank Bhd & Ors [2015] 7 MLJ 445, HC (refd)

Tamabina Sdn Bhd & Anor v Nakamichi Corporation Berhad [2016] MLJU 462, CA (refd)

Wong Kim Fatt v Leong & Co Sdn Bhd & Anor [1976] 1 MLJ 140 (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) s 150

Companies Act 2016 ss 32, 32(2), 33(1), 202, 202(2), 290, 290(1),

(1)(a), 291, 297, 297(2)(a), (2)(b), 302(2)(a), 314, 619

Surendra Ananth (SS Gabriel with him) (N Saraswathy Devi) for the plaintiff. Arun Krishnalingam (Aaron Siva with him) (Sativale Mathew Arun) for the defendants.

Ahmad Fairuz JC:

INTRODUCTION

[1] The plaintiff by an originating summons applied to this court to declare the appointment of the first defendant as a director of the third defendant null and void. The basis of the application stems from the plaintiff's contention that the manner in which the appointment was made ie via a circular resolution, contravenes s 302(2)(a) of the Companies Act 2016 ('the Act') as the company's constitution requires a general meeting to be convened for such appointments. The defendants argued otherwise, stating that there was justification to employ the manner in which the resolution was passed and there was no contravention of the Act.

[2] This court allowed the application and ruled that there was a breach of the act when the second defendant was appointed via a written resolution. This is contrary to an express provision under the constitution of the company which provides for the appointment of directors to be carried out via a general meeting. This had attracted the prohibition contained under s 302(2)(a) of the Act.

BACKGROUND

The background of the matter are as follows

[3] The plaintiff, a Syrian national with a permanent residency in Malaysia is a director and a 40% minority shareholder in the third defendant. The second defendant is a director and 60% majority shareholder of the third defendant. Both were the founding directors of the third defendant. The third defendant is a private company limited by shares that was incorporated in Malaysia in 1999. Its business is related to the process, manufacture and export of upstream and downstream palm oil and other edible oil products.

[4] The first defendant was appointed as director in the third defendant on 4 September 2018. The fourth defendant is the company secretary who was appointed by the third defendant's board after the appointment of the first defendant on 6 September 2018.

[5] Sometime in 2015, relationship between the plaintiff and the second defendant turned sour. It led to a situation where there was deadlock at the board of director's level. Both the plaintiff and second defendant no longer could cooperate together. The company's financier filed a lawsuit against the third defendant which resulted in the relationship between the two founding members of the company to deteriorate even further. The deadlock resulted in the company not being able to function in its ordinary course of business.

[6] It was explained in the affidavit in reply of the second defendant that as a result of the deadlock, he had to act in the best interest of the company. This led to the passing of the resolution dated 4 September 18 ('the written resolution') which appointed the first defendant.

[7] The plaintiff refused to recognise the appointment of the first defendant. The subsequent appointment of the fourth defendant as company secretary was also disputed by the plaintiff. This led to the filing of the application before this court.

THE PLAINTIFF'S CONTENTION

[8] The plaintiff's contended that this application revolves around a narrow construction of law on the appointment of the first defendant as director of the third defendant. The specific provision of law being s 302(2)(a) of the Act.

[9] The plaintiff contended that the second defendant's action on 10 August 2018 to issue a notice of requisition to propose by ordinary resolution to appoint the first defendant as an additional director of the third defendant under s 290(1)(a) of the Act ('the proposed resolution') had breached the Act. This was because the proposed resolution was eventually passed as a written resolution on 4 September 2018 when the second defendant, as a major shareholder signified his agreement to the proposed resolution by way of email.

[10] The plaintiffs argued that as article 67 of the articles of association ('the AOA') provides that all ordinary resolutions are to be passed at a general meeting, the action of the second defendant passing the written resolution was contrary to the provision of s 302(2)(a) of the Act which provides that any resolution may be properly moved as a written resolution unless the resolution if passed, would be ineffective by reason of inconsistency with the constitution of the company. By definition, the constitution of the company includes the articles of association ('AOA') of the company.

[11] It was argued by the plaintiff, that s 302(2)(a) of the Act was a carve out intended by Parliament to allow the provision of the AOA to take primacy over

A the Act. The Latin maxim of *generalia specialibus non derogant* was therefore, applicable.

THE DEFENDANT'S CONTENTION

B **[12]** The defendants on the other hand, argued that s 290(1) of the Act provides that a resolution of members of a private company (of which the third defendant is one) shall be passed either by a written resolution or a meeting of members. As the third defendant is private company, the said provision allows for an option to be chosen when passing a resolution. It was argued that
C article 67 of the AOA cannot override the provision of the Act (s 290(1)) as the strict prohibition in s 32(2) of the Act states that a provision of any AOA which contravenes the Act has no effect. That essentially, was the gist of the defendants' argument.

D ANALYSIS

[13] For the purposes of considering this application, it is important that the relevant provisions which were highlighted by the plaintiff and defendants
E counsels are discussed.

[14] Section 32 provides for how a company adopts a constitution. The constitution once adopted, will have no effect to the extent that it contravenes or is inconsistent with the provisions of the Act. It was contended by the
F defendants that s 32(2) is the provision under the Act that nullifies any provision of the constitution which is contrary to the Act. It reads as follows:

> Section 32 Company may adopt a constitution
>
> (1) A company may adopt a constitution for the company and the adoption
G shall be by way of special resolution.
>
> (2) *The constitution of a company has no effect to the extent that it contravenes or is inconsistent with the provisions of this Act.*
>
> (3) Subject to the provisions of this Act, the constitution adopted under
H subsection (1) shall be binding on the company, its directors and its members.
>
> (4) The company shall lodge the constitution with the Registrar within thirty days from the adoption of a constitution under subsection (1).
>
> I (5) The company and every officer who contravene subsection (4) commit an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit and, in the case of a continuing offence, to a further fine not exceeding five hundred ringgit for each day during which the offence continues after conviction.

[15] It was argued by counsel for the defendants that the passing of a private company's resolution can either be passed by a written resolution or a meeting of members. As such, an option is given to members to determine the appropriate mode of passing a resolution. In this regard, s 290 of the Act was alluded to. It reads as follows:

Section 290 Passing a resolution

(1) A resolution of the members or of a class of members of a private company shall be passed either —

(a) by a written resolution; or

(b) at a meeting of the members.

[16] Appointment of directors is provided for under Chapter 3 — Management of Company. Section 202(2) provides that directors who are appointed subsequent to the incorporation of the company, may be appointed by ordinary resolution. Section 202 of the Act provides:

Section 202 Named directors and subsequent directors

(1) A person named as a director in an application for incorporation of a company shall hold office as a director from the date of incorporation until that person ceases to hold office as a director in accordance with this Act.

(2) *All subsequent directors of a company may be appointed by ordinary resolution.*

(3) Subject to the constitution, the Board may, at any time, appoint a director in addition to existing director and the director so appointed shall hold office —

(a) in the case of a public company, until the next annual general meeting; or

(b) in the case of a private company, in accordance with the terms of appointment.

[17] This in turn will require the examination of what ordinary resolutions mean under the Act. Section 291 provides that an ordinary resolution may be passed by members or a class of members representing a simple majority by either voting in person or proxy at a members meeting or by way of a vote on a written resolution. Section 291 provides as follows:

Section 291 Ordinary resolutions

(1) An ordinary resolution of the members or a class of members of a company means a resolution passed by a simple majority of more than half of such members —

(a) who are entitled to vote and do vote in person, or where proxies are allowed, by proxy at a meeting of members; or

(b) who are entitled to vote on a written resolution.

(2) Subject to paragraph (1)(a), an ordinary resolution passed at a meeting on a show of hands is passed by a simple majority if it is passed by members representing a simple majority of members who are present at the meeting.

[18] It was contended that a written resolution cannot be passed to remove a director. However, it is silent where appointment of directors is concerned. Reference is made to s 297 which reads as follows:

Section 297 Written resolutions of private companies

(1) A resolution shall be proposed as a written resolution by the Board or any member of a private company.

(2) The following shall not be passed as a written resolution:

(a) a resolution under section 206 to remove a director before the expiration of his term of office; or

(b) a resolution under section 276 to remove an auditor before the expiration of his term of office.

(3) An ordinary resolution is passed on a poll taken at a meeting if it is passed by members representing more than half of the total voting rights of the members who are entitled to vote and do vote in person or by proxy on the resolution.

Subject to the provision of the constitution, any matter that may be passed by ordinary resolution may also be passed by special resolution.

[19] Relying on the above provisions, counsel for the defendants argued that by virtue of s 32(2), the AOA of a company cannot contravene any provision of the Act. The Act on the other hand, provides that in a private company such as the third defendant, can rely on s 297 where written resolutions can be passed by a board or a member of a private company. What cannot be passed by a written resolution is contained in s 297(2)(a) and (b). The sum total of this analysis means that the written resolution passed on 4 September 2018 was therefore valid.

[20] Counsel for the plaintiff on the other hand, sought to rely on s 302(2)(a) of the Act. It was argued that when a written resolution is moved, it cannot contravene the written law or the constitution of the company. It reads as follows:

Section 302 Members' power to require circulation of written resolution

(1) Any member of a private company having a total of five per centum, or such lower per centum as specified in the constitution, of the total voting

rights of all eligible members may require the company to circulate a resolution that may properly be moved as a written resolution. A

(2) *Any resolution may properly be moved as a written resolution unless the resolution —*

(a) *if passed, would be ineffective whether by reason of inconsistency with any written law or the constitution*; B

(b) is defamatory of any person;

(c) is frivolous or vexatious; or

(d) if passed, would not be in the best interest of the company. C

[21] It was argued that article 67 being a provision of the constitution of the company, stipulates in no uncertain terms that the appointment of a director is to be carried out at a general meeting. Counsel for the plaintiff argued that the prohibition in s 32(2) of the Act did not operate as s 302(2)(a) was an exception provided under the law to give primacy to the constitution of the company. D

FINDINGS OF THE COURT

[22] Reference is made to article 67 of the articles of association where it provides as follows: E

The Company may, from time to time by ordinary resolution passed at a general meeting, increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office. F

[23] It is obvious form a reading of article 67 of the AOA, the appointment of directors must be done at a general meeting. Even if the emphasis is on the word 'may', it does not provide any other alternatives. As such the words may refers specifically to the company convening a general meeting. G

[24] This court is compelled to agree with counsel for the plaintiff that this represents a carve out of the general prohibition in s 32(2). It is an exception specifically provided for by the Act and would fall under the application of the maxim *generalia specialibus non derogant.* The usage of that canon of construction is not alien in its application. This can be seen in *Qatar Islamic Bank v Asian Finance Bank Bhd & Ors* [2015] 7 MLJ 445 Wong Kian Kheong JC at para 42(b) held: H

(iii) there is a canon of construction, 'generaliaspecialibus non derogant', which provides that if there is a conflict between two provisions in the same document, the specific provision should prevail over the general provision. This maxim has been applied in statutory interpretation but according to Bowen LJ in the English Court of Appeal case of *Curtis v Stovin* (1889) LR 22 QBD 513 at p 517, rules for construing statutes also apply to construe documents. In Grundt, at 28, Cohen LJ I

(as His Lordship then was) favoured a specific provision in the AA vis-a-vis a general provision in the AA. In applying the maxim 'generaliaspecialibus non derogant', I have no hesitation to give effect to the specific provisions of art 70(e) and (g) in preference to the general closing words.

[25] It has to be noted that s 302(2)(a) provides primacy to the constitution/AOA when it states that any resolution, moved as a written resolution, would be ineffective if it is inconsistent with any written law or the constitution of the company.

[26] This court is of the opinion that where there is a specific provision that allows for an exception under the Act, such exception must be taken as a literal approval to derogate from the general provision.

[27] In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 at pp 758–759; [1995] 3 CLJ 520 at p 550, the Court of Appeal held as follows:

> There is another compelling reason for holding that the respondents have no caveatable interest in the land. *It lies in the rule of construction expressed in the maxim generalibus specialia derogant. Where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are to be found in the same or different statutes, the special or specific provision excludes the operation of the general provision.*
>
> Thus in *Commissioner of Income Tax v Shahzada Nand & Sons AIR* 1996 SC 1342 where (at p 1347) Subba Rao J said:
>
> > Another rule of construction which is relevant to the present enquiry is expressed in the maxim generalia specialibus non derogant, which means that when there is a conflict between a general and a special provision, the latter shall prevail. The said principle has been stated in Craies on Statute Law (5th Ed), at p 205, thus:
> >
> > > The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply. (Emphasis added.)

See also *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119.

[28] This court is of the opinion that there is no incongruity between the constitution/AOA and the Act if such interpretation is made. The prohibition under s 32(2) merely operates as notice that when a company adopts a constitution, any provision of the constitution that contravenes the Act cannot be sustained. However, s 302(2)(a) cures the inconsistency as it provides primacy of the constitution/AOA over the Act.

[29] In response to the plaintiff's arguments, counsel for the defendant argued that the words 'if passed' in s 302(2)(a) presupposes that a resolution has been passed. It does not refer to the manner on how the resolution was passed. The ineffectiveness of the resolution only comes into play after the resolution has been passed ie if the object of the resolution offends the written law or the constitution of the company, only then will the resolution fall foul of sub-s 302(2)(a). It does not touch on the manner in which the resolution was passed. As such, there is a distinction between the 'object' and the 'manner'.

[30] With respect, this court is unable to agree with the interpretation by counsel for the defendant. It presupposes a two stage assessment when interpreting s 302(2)(a) of the Act. From the facts of this case, the resolution was approved and acted upon. The question to be answered is whether the manner in which the resolution was passed contravened the constitution of the company.

[31] This court is of the view that even before the object is met (as suggested by counsel), the manner in which such resolution was moved must first be in accordance with the constitution/AOA of the company. It cannot mean that the law is not concerned with the manner in which the resolution was moved. Such an interpretation would suggest that it is open for parties to disregard the constitution of the company. This renders the specific provision of the constitution/AOA otiose. It cannot be so.

[32] The appointment of a company director is a significant action by the company. It must be in accordance with the constitution/AOA of the company. If the manner in which such appointments are to be made is prescribed, it has to be followed religiously as the AOA of the company is the basic law of a company. In fact, the AOA is a contractual obligation that members subscribe to and it contains covenants that each member will observe all the provisions of the AOA.

[33] In the early case of *Wong Kim Fatt v Leong & Co Sdn Bhd & Anor* [1976] 1 MLJ 140, Chang Min Tat J held as follows:

> He made two concessions, *one was that a member was bound by the Articles of Association as a matter of contractual obligation which he had undertaken by subscribing thereto. With respect, he is of course right.* To contend otherwise would mean he had to prove, for example, the following passage from the judgment of Lord Herschell MR in *Welton v Saffery* [1897] AC 299 at p 315, wrong:
>
> > Section 16 of the Act of 1862 provides that the articles of *association, when registered, shall bind the company and the members thereof to the same extent as if each member had signed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators to conform to all the regulations contained in such articles, subject to*

> *the provisions of this Act. The articles thus become in effect a contract under seal by each member of the company, and regulate his rights. They cannot, of course, diminish or affect any liability created by the express terms of the statute; but, as I have said, the statute does not purport to settle the rights of the members inter se, it leaves these to be determined by the articles* (or the articles and memorandum together), *which are the social contract regulating those rights*.
>
> I think it was intended to permit perfect freedom in this respect, *it is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights inter se.* Such rights can only be enforced by or against a member through the company, or through the liquidator representing the company; but I think that no member has, as between himself and other member, any right beyond that which the contract with the company gives. (Emphasis added.)

See also *Ling Beng Hui & Ors v Ling Beng Sung* [1990] 2 MLJ 186; *Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 2)* [1998] 1 MLJ 110.

[34] In *Beh Chun Chuan v Paloh Medical Centre Sdn Bhd & Ors* [1999] 3 MLJ 262 at p 268 Kang Hwee Gee J observed that:

> Much like a club is governed by its constitution, a company is governed by its memorandum and articles of association. *A company's memorandum and articles are therefore the cananic yardstick upon which the legality of its act and those of its officers must be tested and any acts of the company or of its officers which are opposed to its memorandum or articles are likely to be struck down by the court as ultra vires.* (Emphasis added.)

[35] The effect of a constitution when adopted, will bind the company and the members to the same extent as if the constitution had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the constitution (see s 33(1) of the Act).

[36] This court is of the firm view s 302(2)(a) can be interpreted literally upon a plain reading of the said provision. There is no ambiguity in such an interpretation. Conversely, the argument taken by counsel for the defendants in his submission urged this court to read s 290(1) of the Act, in light of s 32(2) read together with s 619, rendering article 67 of the AOA to be inconsistent with s 290(1) of the Act. The latter approach as suggested, would be an interpretation that does not support the plain meaning of the provision.

[37] It is an accepted principle that legislation is always to be understood first in accordance with its plain meaning (see *Criaes on Legislation* (8th Ed)). In *NS Bindra's Interpretation of Statutes* (10th Ed) at p 435 provided the following comments:

> It is elementary that the primary duty of a court is to give effect to the intention of the legislature as expressed in the words used by it and not outside consideration can be called in aid to find that intention. A statute must be constructed in a manner which carries out the intention of the legislature. The intention of the legislature must be gathered from the words of the statue itself. If the words are unambiguous or plain, they will indicate the intention with which the statute was passed and the object to be obtained by it. When the language of the law admits of no ambiguity and is very clear, it is not open to the courts to put their own gloss in order to squeeze out some meaning which is not borne out by the language of the law.

DEADLOCK SITUATION

[38] The dilemma faced by the second defendant in this case was his inability to convene a meeting due to the breakdown in relationship between him and the plaintiff. It is before this court that the second defendant holds 60% shares while the plaintiff holds the remaining 40%.

[39] Article 47 of the company's AOA provides as follows:

> No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business. Save as herein otherwise provided, two members present in person shall be a quorum. For the purposes of this regulation 'member' includes a person attending as a proxy or as representing a corporation which is a member.

[40] It is therefore clear that in a general meeting of the company, that no business shall be transacted at the general meeting if there is no quorum. Quorum would constitute two members. It could be reasonably presumed that the second defendant was relying on article 47 when he moved for the resolution to be passed to appoint the first defendant.

[41] As can be seen from the affidavit in reply of the second defendant, he was having difficulty in convening a meeting. See paras 6 and 10(i)–(iii). It was admitted that the board of directors of the third defendant was in a deadlock ('buntu'). Further, it was admitted by the second defendant that he and the plaintiff were no longer cooperating and working together. As such, the second defendant decided to appoint the first defendant as an additional director. The mode of which was done by way of a circularised written resolution signed by a single director namely the second defendant.

[42] It is also clear form the affidavit in reply of the second defendant that his actions to circulate the written resolution stems from the impracticability of convening a general meeting. A read of his affidavit would lead to an understanding that even if the meeting was convened, it would be inquorate as the plaintiff will not attend. In fact, there was no evidence of the email sent by

the second defendant to the plaintiff requisitioning the meeting was responded to by the plaintiff.

[43] In such a situation, where there is a clear breakdown between the two shareholders of the company, the action by one party (such as the second defendant) to unilaterally appoint an additional director cannot be the solution to be adopted, no matter how altruistic the intentions were.

[44] The second defendant must resort to what is provided under the Act. This court is of the firm view that the solution to the deadlock can be resolved by having recourse to s 314 of the Act which provides as follows:

> Section 314 Power of Court to order meeting
>
> (1) This section applies if for any reason it is impracticable —
>
> (a) to call for a meeting of members of a company in any manner in which meetings of that company may be called; or
>
> (b) to conduct the meeting in the manner prescribed by the constitution or this Act.
>
> (2) The Court may, either of its own motion or on the application —
>
> (a) of a director of the company;
>
> (b) of a member of the company who would be entitled to vote at the meeting; or
>
> (c) of the personal representative of any such member, order a meeting to be called, held and conducted in any manner the Court thinks fit.
>
> (3) Where such an order is made, the Court may give such ancillary or consequential direction as the Court thinks expedient.
>
> (4) Such directions may include a direction that one member of the company present in person or by proxy at the meeting be deemed to constitute a quorum.
>
> (5) A meeting called, held and conducted in accordance with an order under this section shall be deemed for all purposes to be a meeting of the company duly called, held and conducted.

[45] The predecessor to s 314 of the Act is s 150 of the Companies Act 1965 ('the 1965 Act'). It is in pari materia with the s 314 of the Act. In *Low Son Siang @ Loo Soon Siong v Lee Kim Yong* [1998] MLJU 467, Malik Ishak J (as he then was) held as follows:

> Now, when confronted with an application like encl 4 grounded on s 150 of the Companies Act 1965, the first and foremost question to pose would be: Whether the desired EOGM can be conducted? Here, surely the onus would be on the plaintiff to show to this court that it was impracticable to call for a meeting of the

company in any manner whatsoever or even to conduct the meeting in the manner as prescribed by the Articles of the company (*Leong Ah Hong v Hup Seng Co Ltd* [1963] 1 MLJ 164 at p 165). Article 46 of the Articles of Association of the company states that:

> No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business. Save as herein otherwise provided, two members present in person shall be a quorum. For the purpose of this regulation 'member' includes a person attending as a proxy or as representing a corporation which is a member.

and clearly 'two members present in person shall be a quorum'. Here, the defendant refused to attend the EOGM and surely this court has the discretion to call for such EOGM with a quorum of one as sought for by the plaintiff in encl 4.

[46] The court in *Low Son Siang @ Loo Soon Siong v Lee Kim Yong* went on to direct a general meeting as it was impracticable to call it by any other means.

[47] The Court of Appeal case of *Tamabina Sdn Bhd & Anor v Nakamichi Corporation Berhad* [2016] MLJU 462 s 150 of the 1965 Act was interpreted as follows:

> [4] The gist of the section is that, if for any reason it is impractical to call a meeting or to conduct a meeting in the manner prescribed the articles of association of the company or the Act, *the court may on its own motion or on an application of any director or any member entitled to vote at the meeting or personal representative of such member order a meeting to be called held and conducted in such manner as the court thinks fit*. The key phrase in the section is 'if for any reason it is impracticable' to call or conduct a meeting.

[48] From the above discussion, it is patently clear that recourse must be made to s 314 of the Act by parties in a situation where a deadlock has occurred at the board level. Section 314 of the Act clearly does not preclude a court form convening a meeting by the attendance of one single shareholder. The onus lies on the party seeking to move the court to order such a meeting by demonstrating that it is impracticable to do so under the normal provisions of the company's AOA. The second defendant failed to resort to the above provisions of the Act.

[49] Given that this court is of the opinion that the written resolution was ineffective, it is of the view that other alternative arguments raised by the parties were no longer necessary to be considered. Parties too, had not pursued the other points assiduously as the crux of the issue was on the interpretation of s 302(2)(a) of the Act.

A CONCLUSION

[50] In the circumstances, this court is of the view that the resolution passed on 4 September 2018 was against the constitution/AOA of the company in particular, article 67. As such, the resolution was ineffective by virtue of sub-s 302(2)(a) of the Act. The application in encl 1 is therefore allowed. Cost of RM10,000 as agreed upon by parties is awarded to the plaintiff.

B

Plaintiff's application allowed with costs of RM10,000.

C

Reported by Mohd Kamarul Anwar

D

E

F

G

H

I